
(2000) 01 BOM CK 0022

In the Bombay High Court

Case No : Writ Petition No. 3957 of 1993

Rashtriya Hatmag Yantramag Kamgar Sangh

APPELLANT

Vs

K.D. Kochargaonkar and Others

RESPONDENT

Date of Decision : 25-01-2000

Acts Referred:

Citation : (2000) 85 FLR 609 : (2000) 1 LLJ 1564

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : S.N. Deshpande, for the Appellant; V.P. Vaidya, for the Respondent

Final Decision : Allowed

Judgement

J.A. Patil, J.—By this writ Petition under Article 226 of the Constitution of India, the Petitioners Union has challenged the order dated July 27, 1993 passed in Complaint (ULP) No. 87 of 1988 by the learned member of the Industrial Court, Thane. The learned member dismissed the said complaint. The facts relevant for deciding this writ Petition are in brief as under:

2. The Petitioner is a Trade Union registered under the Trade Unions Act. Respondent No. 2 is the proprietor of Ambika Silk Mills, Bhivandi, District Thane, which is engaged in the business of manufacturing cloth. The Petitioners Union filed a complaint dated February 26, 1989, alleging that respondent No. 2 Walchand Sheth and one Paras Seth were guilty of indulging in unfair labour practices under Item 1(a), (b) of Schedule II and Items 9 and 10 of Schedule IV of the MRTU & PULP Act, 1971. The Petitioner which espouses the cause of 20 workmen, working in the said Mill, alleged that the respondent did not maintain any statutory record, did not pay the workmen even minimum wages. It was further alleged that the respondents were obtaining signatures of the workmen on blank papers under the threats of dismissal. After the workmen joined the Petitioner union the respondents became vindictive, started harassing the workmen. There were in all 43 workmen on the establishment of the said Mill,

out of whom 20 joined the Petitioners union. The respondents with a view to teach a lesson to the said workmen did not allow them to resume their duties after December 16, 1988 and thereafter, committed violation of terms of contract of employment. On the basis of these averments, the Petitioner union prayed for a declaration that the respondent had engaged in unfair labour practice as alleged and prayed for a direction to the respondents to desist from engaging in unfair labour practices. The Petitioner further prayed for a direction to the respondents to allow the 20 workmen listed in Annexure "A" to resume their duties and to pay them their full wages from February 16, 1988.

3. The respondent No. 2 and Paras Seth resisted the complaint by filing their written statement wherein they denied that the workers mentioned in Annexure "A" were in their employment. They contended that under an agreement of labour contract dated January 8, 1988, the respondents have given their power-looms to one Akmal H.M. Faruqui for conducting business and as such the respondents had no concern with the said workmen. It is denied that original respondent No. 2 Paras Seth, was a partner of the Mill. The respondents denied all the allegations in respect of the alleged unfair labour practices and submitted that since there was no relationship of employer and employee between them and 20 workmen, there was no question of granting any relief to the Petitioners.

4. I have heard Shri S.N. Deshpande, the learned advocate for the Petitioner, and Shri V.P. Vaidya, the learned Advocate for respondent No. 2. Shri Deshpande submitted before me that the learned member of the. Industrial Court ignored the evidence on record, which, according to him, clearly establishes the fact that there exists a relationship of employer and employees between the twenty workmen. Shri Deshpande pointed out that the learned member had unnecessarily blamed the Petitioner for not producing the relevant documentary evidence, when, as a matter of fact, the relevant documents were in the custody of the respondent No. 2 or that he had failed to maintain the same. According to Shri Deshpande, non-production of relevant documents by respondent No. 2 warranted drawing of an adverse inference against him. The learned member declined to do so without any justifiable reason. Shri Vaidya, on the other hand, supported the impugned order and submitted that the learned member was right in not placing any reliance upon the bare words of the two workmen. Shri Vaidya further submitted that respondent No. 2 could not have owned more than two power looms and as such the theory that there were 43 workmen in his employment could not be accepted.

5. The Petitioner union is espousing the cause of the twenty workmen, who according to it, are in the employment of Ambika Silk Mills, It is true that the said Mill is not impleaded as a party to this proceeding. However, that does not matter, since it is admitted even by respondent No. 2 that the said mill is a proprietary concern and that he is the owner thereof. The only question, which was, therefore, required to be considered by the Tribunal was whether the Petitioner had succeeded in establishing the fact that the twenty workmen listed

in Annexure A are the employees of respondent No. 2.

6. In support of its claim, the Petitioner examined two witnesses, namely, Phazal Ahmed (UW-1) and Totaram Shinde (UW-2). The evidence of Phazal Ahmed (UW-1) is to the effect that he joined the Ambika Silk Mills in 1971 and that at the relevant time he was working as a jobber. According to him, there were in all 34 power looms in the Mill, out of which, there were 18 English power looms and the remaining 16 were Japanese power looms. He further stated that there were in all 43 power loom workmen and that he is the oldest of the listed employees. Phazal Ahmed (UW-1) then stated that the twenty workmen mentioned in Annexure A were working with him in the same Mill and most of them are weavers. He specified the work done by some of those employees by specifying their names. The further evidence of Phazal Ahmed is to the effect that the weavers used to work in two shifts, first starting from 7.00 a.m. and ending at 7.00 p.m. and the second shift, starting at 7.00 p.m. and ending at 7.00 a.m. According to him, the wages were paid to all the workmen after obtaining their signatures in voucher books, but they were never provided with any attendance cards. Phazal Ahmed claims that he was getting Rs. 3000/- per month as wages. He further stated that although Friday was a weekly off but the workmen were not given the facility of casual leave, sick leave or privilege leave. Phazal Ahmed further stated that in 1983, the workmen resorted to strike for two days for their demand of 5 paise increase per meter. According to him the Petitioner union was formed in 1987 and that all the 20 workmen joined the said union. The grievance of Phazal Ahmed (UW-1) is that from February 16, 1988, respondent No. 2 did not allow the workmen listed in Annexure A from resuming their duties. However, the remaining workmen, who were not the members of the union, were allowed to work. The evidence of the other witness Totaram Shinde (UW-2) is almost on the same lines and he was stated that he was working as Kandiwalla.

7. The learned member of the Industrial Court has however, found it difficult to accept the oral evidence of the abovementioned two witnesses. According to him, the Petitioner did not produce any documentary evidence nor did it examine owners of the power looms in the adjacent area. The view taken by the learned member is, however, patently erroneous since he has ignored certain material facts disclosed by the evidence on record. Respondent No. 2 Walchand Shah made his oral statement, admitting that he is the Proprietor of the Ambika Silk Mill and that Paras Seth (Original respondent No. 2) was in his employment as an Accountant only. He further stated that there are only 4 power looms in Ambika Silk Mills and that since beginning only 4 power looms were working in the said Mill. Respondent No. 2 further stated that under an agreement dated January 8, 1988, he handed over his power looms to one Akmal Faruqui for running the same on the rental basis. In the cross-examination, respondent No. 2 admitted that there are 34 power looms in the shed situated in the compound of Ambika Silk Mill and out of which 18 are English power looms and 16 are Japanese power looms. He however, denied that any of the workmen mentioned in Annexure "A" was in his employment. The learned member of Industrial Court failed to take

note of the fact that respondent No. 2 has tried to up press certain material facts which were obvious. He did not examine Akmal Faruqui, who is admittedly living in Bhivandi and to whom he claims to have transferred his power looms nor did he produce original deed of agreement dated January 8, 1988. He produced only the xerox copy of the said agreement upon which the learned member has placed reliance to hold that the power looms were already transferred to Akmal Faruqui. The learned member has committed an apparent error of law in admitting the xerox copy of the agreement to evidence and placing reliance on it. He ignored the provisions of Section 65 of the Evidence Act which refers to the cases in which secondary evidence of original documents can be given. It is pertinent to note that respondent No. 2 admitted that there are 34 power looms in the shed in the compound of Ambika Silk Mill. He did not state that those 34 power looms belong to others. He did not disclose the names of those owners if the said power looms were really owned by others. Respondent No. 2 did not also explain as to under what arrangement 34 power looms were allowed to be operated within the premises of the Ambika Silk Mill, if they did not belong to him. The learned member has turned Nelson eye to all these crucial facts which are apparent from the evidence on record. He has relied upon a bald statement of respondent No. 2 that his power looms were given to Akmal Faruqui under an agreement without satisfying himself as to whether the said agreement was really acted upon or not.

8. Respondent No. 2 in his capacity as the proprietor of the Ambika Silk Mill is supposed to have maintained certain record and registers as per various labour laws. However, he did not produce any such records inspite of the fact that the Petitioners had given an application Exh. M page 63 calling upon him to produce the relevant record. However, Respondent No. 2 resisted the application on the ground that the workmen mentioned in Annexure "A" were not in his employment and therefore, there was no question of producing any such record. He further pleaded that the document asked for were not relevant and that they were not in his custody. The learned member passed a round about order on his application, accepting the statement made on behalf of the Advocate of the respondent No. 2 and directing him to file a purshis to the effect that the said documents were not in the custody of respondent No. 2. It is curious to note that in spite of this position, the learned member has proceeded to observe that the Petitioner did not produce any documentary evidence. As per the version of respondent No. 2, only 4 workmen were working in his mill right from the beginning. However, he did not disclose their names. One does not know whether those 4 workmen are among the 20 workmen listed in Annexure "A". Respondent No. 2 could have produced the relevant record in respect of those 4 workmen in order to show that there were never 43 workmen in his employment. It cannot be believed that respondent No. 2 is without any record in respect of workmen, whatever may be their strength in his employment. Under these circumstances, it is surprising to note that the learned member instead of drawing any adverse inference against respondent No. 2 has drawn the same against the Petitioner. In

Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , it was held that a party in possession of a best evidence which could throw light on the issue in controversy, cannot withhold it on the abstract of doctrine of burden of proof or on the fact that it was not called upon to produce it. The Supreme Court held that in such circumstances, adverse interference has to be drawn against the party withholding best evidence in its possession. It appears that the learned member being unmindful of this position has committed a grave error in drawing adverse inference, not against respondent No. 2 but against the Petitioner.

9. Consequently, the finding given by the learned member on the crucial issue that the members of the Petitioner union were not proved to be in the employment of respondent No. 2 cannot be sustained. It must be said that the learned member has misdirected himself and committed a patent mistake both of fact and law, which calls for interference by this Court to set right the things.

10. Shri Vaidya, the learned Advocate for respondent No. 2 referred two decisions which lay down the provisions as per which relationship between employer and employee has got to be determined. The first is Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, , wherein it was held that the prima facie test to determine the relationship is the existence of right of control in respect of the manner in which the work is to be done. The second decision relied on by Maharashtra General Kamgar Union Vs. Cipla Limited and Others, , in which it was pointed out that no particular test would be decisive and that facts and circumstances of each case will have to be appreciated. However, tests of control, supervision, supply of tools and equipment necessary for discharging the functions as also of total dependence of the workmen on the existence of the establishment of the principal employer are some of the material tests which have to be considered.

11. There is no dispute about the propositions laid down by these decisions. However, in the instant case, it is clearly proved that the workmen listed in Annexure A were working in Ambika Silk Mills till they were disallowed to resume their duties after December 16, 1988. Therefore, it is clearly established that there was a relationship of employer and employees between respondent No. 2 and the said workmen. Respondent No. 2 has indulged in unfair labour practice by not allowing the said workmen to resume their work when they were willing to do so. Thus, there is a failure to implement the agreement of service, virtual termination of their services without following due procedure. Consequently, the said workmen are entitled to be reinstated in employment. In Premier Automobiles Employees Union v. Premier Automobiles Ltd. 1987 2 CLR 302 it was held that the most basic term of an agreement between an employer and his employee is that the employee shall make himself available to the employer to do his work and the employer shall pay the employee wages for doing so. Failure to pay wages, when the employee has made himself available to do the employer's work is a breach of the agreement between them.

12. Shri Vaidya submitted before me that in case this Court holds that those 20

workmen are the employees of respondent No. 2, then the matter will have to be remanded to the Industrial Court for deciding whether or not respondent No. 2 is guilty of indulging in unfair labour practice. I do not find any substance in this submission. In the above mentioned case a similar argument was made and while rejecting the same BHARUCHA, J. observed:

"If in the exercise of powers under Article 226 this Court finds the Industrial Court to have been in error, as it does, it may exercise all the powers that is vested in the Industrial Court."

13. As regards the back wages the workmen will be entitled to the same. However, having regard to the fact that a period of about 12 years have elapsed since after the discontinuance of the services of the said workmen, it is improbable that the said workmen have remained idle throughout the said period without obtaining gainful employment elsewhere. Therefore, in these circumstances, it would be proper to direct Respondent No. 2 to pay the back wages at the rate of 50 per cent.

14. For the aforesaid reasons, the impugned order dated July 27, 1993 passed by the learned member of the Industrial Court, Thane, in Complaint (ULP) No. 87 of 1988 is hereby quashed or set aside. It is held that the respondent No. 2 has indulged in unfair labour practices under Item 9 of Schedule IV of the MRTU & PULP Act, 1971. Respondent No. 2 is directed to cease and desist from engaging in unfair labour practices complained of and they are further directed to reinstate all the 20 workmen mentioned in Annexure A and allow them to resume their duty. Respondent No. 2 is further directed to pay 50 per cent of back wages with continuity of service and all consequential benefits to the workmen mentioned in Annexure A for the period February 16, 1988 till the date they are allowed to resume their duties and provide them with work.

15. The writ Petition is accordingly allowed with costs and the Rule is made absolute in the above terms.

16. When this judgment was pronounced Shri Vaidya. the learned advocate for the respondents prayed for staying the operation of the order for a period of two weeks. Shri Deshpande, the learned advocate for Petitioner has no objection in granting such a stay but he prays that the interim injunction granted by this Court on October 4, 1993 should continue till that date.

17. After hearing both the parties, the Court stays the operation of this order for a period of two weeks from today. In the mean time, the interim injunction granted on October 4, 1993 shall continue.

18. Certified copy expedited.